No. 12379

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

ESTATE OF EDWIN F. GILLETTE, HARRIETTE O'NEIL GILLETTE, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

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JURISDICTION.

This case arises on petition to review a decision of the Tax Court of the United States determining an estate tax deficiency of $37,933.11 against petitioner.

Jurisdiction and venue in this Court are predicated upon Secs. 1141, as amended, and 1142, Internal Revenue Code. The petition for review (R. 104) was filed on July 22, 1949, within three months after the Tax Court's decision on April 27, 1949. (R. 103) Petitioner's estate tax return was filed with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California. (R. 96-97, 88)

Jurisdiction of the Tax Court was based upon Secs. 1101 and 871, Internal Revenue Code. The petition for redetermination (R. 4) was filed on August 28, 1947, within 90 days after the respondent's notice of deficiency to petitioner (R. 9) was mailed on June 20, 1947. (R. 5, 15)

STATEMENT OF THE CASE.

The sole issue is whether transfers made by decedent, Edwin F. Gillette, on September 17, 1938 of his interest in the "Hartford Building" property located in Chicago, Illinois and in a summer residence at Lake Beulah, Wisconsin were made in contemplation of death, so that the value thereof should be included in his gross estate for estate tax purposes. (R. 72)

Edwin F. Gillette was born October 19, 1863 and died December 10, 1943. He had been a resident of Pasadena, California since 1917. He was survived by his widow, Harriette O'Neil Gillette, executrix of his estate and petitioner herein, two sons, Hyde and Edwin, and two daughters, Helen and Marietta. (R. 17, 73)

On September 17, 1938 decedent and his sister, Mrs. William S. Jenks, each owned an undivided one-half interest in the following real estate:

> The Hartford Building property, located at the southwest corner of Dearborn and Madison Streets in Chicago, Illinois, acquired by inheritance from their father in 1892.
>
> The Michigan Avenue property, acquired by inheritance from their father in 1892.
>
> The Lake Beulah property, located at Lake Beulah, Wisconsin, acquired in 1893. (R. 17-18, 73)

On September 17, 1938, over five years before his death, decedent transferred his interest in the Hartford Building property to his son Hyde Gillette as trustee of an irrevocable trust (R. 17-18, 73; Ex. 1: R. 20), and conveyed his interest in the Lake Beulah property by warranty deed to his four children. (R. 17-18, 73) The Tax Court sustained respondent's determination that the transfers of the

Hartford Building and Lake Beulah properties were made in contemplation of death, and that the gross estate should be increased by the respective amounts of $120,621.32 and $10,000. (R. 9-11) Petitioner contests such inclusion of these transfers. The values determined by respondent are not in controversy.

On September 17, 1938 decedent also conveyed his interest in the Michigan Avenue property to Hyde Gillette as trustee of a revocable trust. (R. 17-18, 73; Ex. 2: R. 33) The contents of this latter trust as of the date of death, amounting to approximately $225,878.81, were included in the estate tax return (Ex. A: not reproduced per Court order R. 183-184) and no controversy arises in respect thereof. This conveyance is material only insofar as its purposes were related to the purposes of the controverted transfers.

Since its acquisition the Lake Beulah property had been used jointly by the Jenks and Gillette families as a summer home with the expenses to be borne equally by decedent and the Jenks family. (R. 81-82, 118, 165) After the death of decedent's first wife in 1932 the cottage was used mostly by the Jenkses and the Gillette children living in the Chicago area. Decedent continued to make visits during the summer. (R. 115, 158, 175-176)

The Hartford Building is an old 14-story office building standing partly on the land owned jointly by decedent and Mrs. Jenks and partly on land held by an estate not concerned in this proceeding. The portion owned by decedent and Mrs. Jenks was subject to a 99-year lease, under which they had received a net rental of $27,000 per year in equal shares prior to default of the lessee as of September 1, 1933. The lessors declared a forfeiture and obtained possession on December 1, 1933. This matter was handled for the decedent and Mrs. Jenks by Hyde Gillette who had recently graduated from the Harvard School of Business

Administration and was engaged in the investment banking business in Chicago. Thereafter, Hyde Gillette retained building managers, negotiated an operating agreement with the other estate interested in the building, negotiated a mortgage for $85,000 to liquidate accrued taxes that the former lessee had failed to pay, and generally represented the family in connection with the property. In January, 1934 he received formal powers of attorney for these purposes from decedent and Mrs. Jenks, in the latter case acting jointly with Mr. Jenks. After the termination of the lease the net receipts from this property were substantially all required for mortgage interest and expense of fire insurance premiums, attorneys' fees and a small reserve for emergency rehabilitation. From December, 1933 to September, 1938 the sole distributions to decedent for his personal use from this property were $310 in January, 1938, and $593 in August, 1938. (R. 79, 137-138; Ex. 9, 10, 11: not reproduced per Court order R. 183-184)

The Michigan Avenue property, which had once been the family residence, had been leased on March 1, 1909 for a term of 198 years at a net rental of $12,000 per year, which was received in equal shares by decedent and Mrs. Jenks. The lessees were obligated to erect a building on the property costing at least $100,000 within 20 years. This period was extended to 30 years in 1928, and in 1931 was further extended for the life of the lease provided the lessees by March 1, 1939 should place $100,000 in escrow as a guarantee of performance. Also in 1931 decedent and Mrs. Jenks granted an option to the lessees to purchase the property for $375,000, $75,000 being received as a down payment. Decedent and Mrs. Jenks gave a bond secured by a trust deed on the property to convey good title or return the $75,000 if the lessees should elect to complete the purchase. (R. 78-79, 139-141; Ex. 12, 13, 14, 15: not reproduced per Court order R. 183-184)

The decedent was never interested in, concerned with or adept at business or financial affairs. His life was devoted to artistic and cultural pursuits. Though well educated, including a course in architecture, he followed neither that profession nor any other for a livelihood. He was interested in studying and composing poetry in French, and in doing beautiful cabinet work in his work-shop, interested himself in his fraternities and in work on their publications, in a hunt club, a choral society, a tennis and swimming club. He drove a car a great deal and was interested in photography. He devoted all of his time to such pursuits. He was never engaged in remunerative employment. (R. 78, 116, 120-122, 126-127, 135-136)

Decedent's only substantial source of income was the $19,500 per year received under the Hartford Building and Michigan Avenue leases. (R. 115, 125, 142) He showed no interest and took no part in the management of these properties, even after the drastic reduction in the Hartford Building income after 1933, leaving such matters to his son Hyde and his brother-in-law, William S. Jenks. (R. 79, 120, 137-138) Because of his inattention to business and inability to handle his finances, the rental checks were made payable to his first wife. (R. 115, 122-124, 136) After her death in 1932, decedent's daughter Marietta handled the household finances until her marriage to Howard A. Will in 1937. (R. 115)

Despite decedent's substantial income from these two leases, he became financially involved prior to 1920 and was being pressed to meet some bank loans. In 1921 he mortgaged the Hartford Building property for five years for $70,000. Mrs. Jenks joined in the mortgage to accommodate him, but the entire proceeds went to decedent for his personal use. (Ex. 18: R. 145; R. 153) In June, 1926 this mortgage was extended for another five years. It was satisfied some time before 1938, presumably at maturity in 1931

from the $75,000 received in connection with the option agreement on the Michigan Avenue property. Decedent gave Mrs. Jenks his personal promissory note, with his wife as co-maker, for $34,000, dated June 23, 1931, payable on demand and bearing interest at 5% per year payable semiannually. (R. 75, 142; Ex. 17: R. 143) The first two interest payments of $850 were made when due, but no further payments of interest or principal were made on this note. (R. 75, 145) On December 23, 1936 this note was cancelled and a renewal note was given to Mrs. Jenks in the amount of $41,650 covering the principal and accrued and unpaid interest. (R. 75, 142; Ex. 16: R. 144) Decedent never made any payments on this note.

In 1938 Mr. and Mrs. Jenks, Hyde Gillette and Marietta Will lived in or near Chicago. Howard A. Will had been an attorney in Chicago since about 1924. The Gillette and Jenks families had a close family relationship. Mrs. Jenks was very fond of her brother's children. She and decedent were devoted to each other. (R. 79-80)

Through his attendance at French clubs and societies, decedent had become acquainted with Harriette O'Neil, a French teacher of Pasadena, California. (R. 126) On May 8, 1938, decedent wrote a letter to each of his children stating that he and Miss O'Neil were deeply in love with each other and he had repeatedly urged her to marry him, but that she hesitated to come into the family where she might be considered an interloper and to give up the freedom which as a bachelor girl she had so long enjoyed; that he should devoutly welcome any procedure which might tend to overcome the diffidence in meeting the members of the family; that they were lovers "seeking such happiness as may be found at this late date;" and that he hoped the letter would have favorable consideration. Miss O'Neil was then age 41, the decedent 75. (R. 80; Ex. 20: R. 148)

Decedent's children, upon learning of the suggested marriage, were pleased at the prospect (except that the record does not indicate the attitude of Helen). (R. 80, 117-118, 152; Ex. 20: R. 150) However, when Hyde discussed the matter with the Jenks family shortly after he received his father's letter, Mr. Jenks took a different view, and his wife to a lesser degree. The matter was discussed by Hyde and the Jenks family several times, both in Chicago during the summer and at Lake Beulah in August and September. Howard and Marietta Will joined in some of these discussions. (R. 81, 117, 119, 129, 152-154) Mr. Jenks, who largely looked after his wife's interests, did most of the talking, and at times was loud and bitter. Both Mr. and Mrs. Jenks were unhappy over the proposed marriage. They did not see how decedent could afford to marry, and pointed out that he was receiving only $6,000 a year from his interest in the Michigan Avenue property; that he was indebted to Mrs. Jenks on a note, upon which he was not paying the interest; and that they felt that he should not take on additional obligations; also that marriage involved additional expense, and that decedent might possibly encumber his sister's interest in the Hartford Building and Michigan Avenue properties; and that if the optionees in the Michigan Avenue property elected to purchase, it might not be possible to give clear title. Mr. Jenks pointed out that this might be ruinous for the two families because the Michigan Avenue property represented their only remaining source of income. Mr. Jenks at one time said that he would see that decedent was sued for collection of the notes before he incurred further obligations, or he would stop the marriage. (R. 81, 117, 119, 129, 152-154, 162, 166-167, 170) As to the Lake Beulah property, which was used by both families, including grandchildren, as a summer home, Mr. and Mrs. Jenks also indicated that having a new head of the family brought there might pro-

duce complications. Decedent had not been paying his share of the expenses of that property. (R. 82, 157, 165, 171)

Hyde Gillette felt that he would like to do anything he could to prevent a rift in the family. Pointing out the feeling that was developing between decedent and his sister, Hyde asked Mr. Jenks if he could not do something to keep harmony. There had been some acrimonious exchange of letters in the past which had "blown over", and Hyde knew that decedent would become excited and extremely headstrong if Mr. Jenks repeated the statements to decedent. Hyde counseled with Howard Will and his law firm, which had handled the forfeiture of the Hartford Building lease in 1933. It was felt that decedent's indebtedness to Mrs. Jenks might be secured by his interest in the Hartford Building. After further discussion it was decided that since Hyde was handling the Hartford Building, the decedent's interest therein might as well be transferred in trust to Hyde as trustee. Decedent had received only nominal income from that source since 1933, and it did not seem that he would be sacrificing anything by using this property to relieve him of his indebtedness to his sister. Mr. Jenks was adamant on Mrs. Jenks receiving some interest, and Hyde decided that he would see that she was guaranteed at least $1,000 per year out of the approximate $2,000 interest per year due to her. He proposed that part of the decedent's $6,000 a year income from the Michigan Avenue property be used to assure Mrs. Jenks of the $1,000 if the Hartford Building income should be insufficient, and he felt that a trusteeship in him, over the Michigan Avenue property, was a logical vehicle for that purpose. The Michigan Avenue trust was also created to assure delivery of clear title in case of exercise of the purchase option, as Mr. Jenks suggested that an uncooperative wife of the decedent might hamper the transfer under

the option and cause default. Such a trust would also make it more difficult for decedent to encumber his sister's interest in that property. (R. 82-83, 154-157)

The program decided upon and the documents that were later drawn to effectuate it were explained to the Jenkses. (R. 83) The program met with their approval and satisfied their objections to the marriage. (R. 157, 171) They did not insist upon the trust provisions for distribution of the corpus; they may not have known the details to that extent. Their primary interest was to get the note secured and to protect Mrs. Jenks' interest in the Hartford Building and the Michigan Avenue property. (R. 152-154, 174)

Hyde Gillette did not desire to engage in correspondence with his father on the subject. He wanted to handle it orally. He did not wish to create friction between his father and Mr. Jenks. Decedent was never told about Mr. Jenks' statement about suit on the note, but he did know that the Jenks family had objections to the marriage in connection with the indebtedness. (R. 83, 157)

On June 23, 1938 Miss O'Neil spent a day in Chicago on the way to visit further east. The decedent had previously told her that his children were pleased with the idea of the proposed marriage, that Mr. and Mrs. Jenks were not pleased, that he was behind on interest payments to her and the pressure came when the question of marriage arose. (R. 83, 129-130, 132) Miss O'Neil met Hyde at that time. They discussed the problem and the solutions then being formulated, including the possible complications in connection with the Lake Beulah property. Miss O'Neil stated that she would not want to be a fifth wheel as far as the management of the house was concerned, and she would prefer the conveyance of decedent's interest in this property to his children. She thought that probably some arrangement could be worked out to satisfy all of Mr. and Mrs. Jenks' objections. (R. 84, 130, 158)

About August 1, 1938 decedent arrived in Chicago. Hyde told his father in very general terms of the Jenks' attitude toward getting some payment on the note. He did not tell him of Mr. Jenks' threat to bring suit on the note, not wishing to make his father angry. Hyde suggested the program which by that time had been completely formulated, although no documents had been drawn. Hyde told his father that his one purpose was to permit him to continue a happy life and to get married with the friendly feeling of all the family. Decedent's reaction to the plan was that if Hyde and Howard Will "thought it was all right and it met the problems that had arisen, for us to go ahead and draw the instruments." (R. 84-85, 159)

The documents to put the final program into effect were prepared by Howard Will and others in his law firm. (R. 83, 157, 167-169) They were as follows:

(a) An irrevocable trust of the decedent's interest in the Hartford Building property with Hyde Gillette as trustee. (Ex. 1: R. 20) Hyde Gillette, as trustee, executed an agreement assuming payment from the trust assets of decedent's debt to Mrs. Jenks and indemnifying decedent against any action on the note by Mrs. Jenks or her successors in interest. (Ex. 19: R. 146) Subject to the obligation to Mrs. Jenks, the decedent's children were the beneficiaries of the trust, with possibility of remainder interests in their issue.

(b) A revocable trust of the decedent's interest in the Michigan Avenue property, with a charge on income to make up any deficiency between $1,000 per year interest to Mrs. Jenks on her note and interest payments actually made from the Hartford Building trust. Subject to this possible charge, the trust income was to be distributed to decedent. The trust also provided for income distributions of $1,500 per year to his widow after his death, with

the balance of the remainder interest in the children or their issue. (Ex. 2: R. 33)

(c) A conveyance of decedent's interest in the Lake Beulah property by deed to his four children. (R. 18)

(d) An antenuptial agreement between decedent and Miss O'Neil. (Ex. 3: R. 61) This had been suggested by a senior member of the law firm to avoid any doubt as to the validity of the foregoing transfers and to make her consent unnecessary in the event the lessees of the Michigan Avenue property should exercise their purchase option. (R. 86, 168-169, 174) Although it was suggested that Miss O'Neil obtain counsel, she declined to do so, having full confidence in decedent and his son in the consummation of the program. (R. 87, 131, 133)

The trust agreements and the Lake Beulah deed were executed on September 17, 1938. The antenuptial agreement was executed on September 19, 1938. (R. 17-18)

Except at the time of signing these documents, when Hyde and Howard Will attempted to explain them, there were only casual conversations with decedent concerning the plan after the initial discussion about August 1, 1938. (R. 159, 164, 169-170, 173)

Decedent and Miss O'Neil were married October 29, 1938 and lived together until his death. (R. 87, 126) On April 24, 1939 decedent executed his will, leaving all of his property to his wife. (R. 69-71, 87) He did not discuss this will with his wife, and she did not know that he had executed it until after his death. (R. 87, 133, 173) In the 1938 discussions between decedent and his son and son-in-law, the making of a will or the subject of testamentary disposition or substitution therefor was not mentioned. (R. 173)

At all times material decedent was in excellent health. He was a man of pleasant disposition, had a cheerful out-

look on life, and carried on his normal activities up to the time of his death. He had no illnesses more severe than a common cold for many years. He made occasional visits to physicians for check-up examinations, but had never summoned a physician to attend him at home prior to his last illness. He was an expert automobile driver and took many long trips. During the summers of 1938, 1939 and 1940 at Lake Beulah he went swimming every day. In 1939 and 1940 he spent a good deal of time in Estes Park, Colorado, at an altitude of 9,000 feet, repairing his cabin, trimming trees and cutting new trails. He died suddenly on December 10, 1943 from coronary thrombosis. Although for two or three weeks prior to his death he had complained of not feeling as well as usual, he did not see a physician, nor did he curtail his activities. A physician was called to see him on the day he died. About ten days before his death he drove to Los Angeles and sang a two-hour concert standing with his glee club. (R. 87-88, 116-117, 127-128) In his letter of May 8, 1938, advising his children of his proposed remarriage, he expressed himself as being young in spirit, ideals and future outlook, believing that this was sufficient to make up for the disparity in age between himself and Miss O'Neil, who was 33 years his junior. He looked forward to a happy life with Miss O'Neil. (Ex. 20: R. 148)

The lessees of the Michigan Avenue property exercised their purchase option in the spring of 1939, paying $300,000. (R. 88) Subsequently, on September 3, 1940, decedent amended the Michigan Avenue trust to provide minimum payments to him of $6,000 per year, payable from principal if necessary, subject to any payments necessary to be made to Mrs. Jenks. (R. 88) In fact, the income from the Hartford Building trust having been sufficient to pay interest to Mrs. Jenks, no payments have ever been made to her from the Michigan Avenue trust. (R. 164)

Petitioner filed the decedent's estate tax return on or about March 3, 1945 with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, showing total estate tax of $45,064.39, which was paid $12,158.49 on September 27, 1944 and $32,905.90 on March 10, 1945. (R. 19, 88) This return did not include as a part of decedent's gross estate any interest in the Hartford Building property or the Lake Beulah property. (R. 19; Ex. A: not reproduced per Court order R. 183-184)

SPECIFICATION OF ERRORS.

I. The Tax Court erred in failing to find the following facts which were proved by substantial, uncontroverted evidence:

a. Decedent's dominant motive in making the transfers here in question was to do everything necessary to remove the objections on the part of Mr. and Mrs. Jenks to his marriage and permit that marriage to take place with the friendly feeling of his entire family.

b. The antenuptial agreement entered into contemporaneously with the transfers was for the primary purpose of insuring the validity of the transfers as against a possible future claim by Harriette O'Neil that those transfers had been in fraud of her marital rights, and of insuring the giving of good title to the Michigan Avenue property without consent of Harriette O'Neil upon exercise of the lessees' option to purchase.

c. Decedent gave no thought to the devolution of his property after his death and thoughts of death were in fact absent from his mind at the time these transfers were made.

d. The transfers were not made in contemplation of death.

II. The Tax Court erred in that its conclusions of law are contrary to the evidence and its own findings of fact, are based on its own unsupported inferences and are therefore clearly erroneous. In particular, the Tax Court erred in the following respects:

a. In holding and deciding that the transfers here in question were made in contemplation of death and are includible in decedent's gross estate under Sec. 811(c) of the Internal Revenue Code.

b. In failing to hold and decide that the transfers here in question were not made in contemplation of death and were not includible in decedent's gross estate for estate tax purposes.

c. In assuming (in disregard of the evidence) that other methods could have been used to satisfy the objections of Mr. and Mrs. Jenks and in concluding therefrom that the methods actually used were not for that purpose.

d. In disregarding the evidence and its own findings of fact as to decedent's health and mental condition which prove the absence of contemplation of death.

III. The Tax Court erred in disregarding the law in the following respects:

a. In failing to hold and decide that transfers made to enable a marriage to take place are prompted by a living motive and are not made in contemplation of death.

b. In treating as evidence the general presumption of correctness of the Commissioner's determinations, and in failing to hold and decide that that presumption disappears in the presence of evidence proving to the contrary.

c. In failing to base its decision only upon the evidence.

SUMMARY OF ARGUMENT.

I. This Court is fully empowered to review and reverse the Tax Court's decision that decedent transferred property in contemplation of death, in the same manner and to the same extent as a decision of the District Court. Under Rule 52(a), Federal Rules of Civil Procedure, as interpreted by the courts, findings of fact by the trial court are erroneous if not supported by substantial evidence, and this Court is free to draw its own inferences and conclusions from the findings of fact and the evidence. The Tax Court has disregarded material uncontroverted evidence, and has failed to give effect to many of its own findings of fact. Instead it has made inferences and conclusions unsupported by the evidence and, in some instances, inconsistent with its own findings of fact.

II. The transfers were occasioned by an affirmative living motive established by clear and uncontradicted evidence.

A. Decedent's motive was to remove an important obstacle to his marriage. His prospective bride was reluctant to accept his proposal without the consent and approval of his family. His children by a prior marriage did approve, but his sister, to whom he was closely attached, and her husband disapproved, largely because of a debt owed by decedent to his sister. Personal complications in connection with joint occupancy of the summer residence at Lake Beulah were also involved. Decedent's son, assisted by his son-in-law, an attorney, worked out a plan to meet the objections of Mr. and Mrs. Jenks and embracing the controverted transfers. This plan was suggested to and approved by decedent for the sole purpose of making possible his proposed marriage with the approval of his family

B. Decisions in other cases establish that property transfers under comparable circumstances were not made in contemplation of death.

C. The plan was responsive to the remarriage motive. Other motives can not properly be attributed to decedent. The Tax Court's apparent inference that decedent had a long-range motive for distribution of property to his children in contemplation of death is not supported by any evidence and is completely inconsistent with his character, which had been the same for the preceding 20 years or more. From decedent's standpoint the transfers were a very reasonable means of dispelling the objections of his sister and her husband to his marriage. It is immaterial that his problem might have been solved by some different means.

D. The antenuptial agreement, an incidental document in support of other parts of the plan to remove objections to the marriage, does not support the Tax Court's decision.

III. Absence of contemplation of death is further established by other evidence. The condition of his health, the range and nature of his activities, and the fact that he was about to be married all make it unlikely that thoughts of death were in his mind in 1938, and his long record of lack of foresight and acumen in financial matters show that such thoughts, if they did exist, would not have impelled him to action.

IV. The general presumption of correctness attending determinations of the Commissioner was apparently treated as evidence by the Tax Court. This presumption disappears in the presence of any evidence, and thereafter must be disregarded. The evidence, on which the case should have been decided, shows plainly that decedent did not transfer property in contemplation of death.

STATUTE INVOLVED.

Sec. 811(c), as amended, Internal Revenue Code (26 U. S. C. § 811(c)), so far as material, provides:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * *
>
> (c) Transfers in Contemplation of, or Taking Effect at Death.—
>
> (1) General Rule.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—
>
> (A) in contemplation of his death. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter; * * *

Sec. 811(c) was retroactively amended on October 25, 1949 to read as above by Sec. 7 of Public Law 378, 81st Congress, 1st Session, 63 Stat. ..... This amendment made substantive changes in other provisions of Sec. 811(c), but with respect to transfers in contemplation of death the previous statutory language was merely consolidated in the new subparagraph (A), without change in language or substance.

ARGUMENT.

I.

"Contemplation of Death" Issues Are Fully Reviewable By This Court.

Whether a transfer was or was not made in contemplation of death depends upon the facts showing the decedent's motives and the circumstances attending the transfer. In reviewing a Tax Court finding as to contemplation of death, this Court is fully authorized to consider these evidentiary facts and circumstances, and to reverse the Tax Court where they do not support or are inconsistent with the ultimate finding.

Limitations upon the scope of review of such issues by the Courts of Appeals, imposed by a series of Supreme Court decisions culminating in *Dobson* v. *Comm.*, 321 U. S. 231, 64 S. Ct. 495 (1944), have been removed by 1948 legislation. Sec. 1141(a), Internal Revenue Code, as amended by Sec. 36 of the Act of June 25, 1948 (Public Law 773, 80th Cong., 2nd Sess.), 62 Stat. 646, provides that the Courts of Appeals have jurisdiction to review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." Such review is thereby made subject to Rule 52(a), Federal Rules of Civil Procedure, as noted in *Estate of Sullivan* v. *Comm.*, 175 F. (2d) 657 (CA 9, 1949).

In the application of Rule 52(a), two basic principles are established by numerous decisions:

1. This Court may review both the facts as found by the trial court and the evidence upon which those facts are based. If the findings of fact are not supported by substantial evidence, they are clearly erro-

neous within the meaning of Rule 52(a), and this Court is not bound by those findings.

2. This Court is never bound by the inferences and conclusions drawn by the trial court from its findings of fact, but is always free to draw its own inferences and conclusions from the findings and the evidence.

In *Western Union Telegraph Co.* v. *Bromberg,* 143 F. (2d) 288 (CA 9, 1944), this Court said (p. 290):

> "Appellate courts are, however, free to draw inferences and conclusions from findings of fact. See Kuhn v. Princess Lida of Thurn & Taxis, 3 Cir., 1941, 119 F. 2d 704, 705, 706."

In the *Princess Lida* case cited by the Court, it was said (pp. 705-706):

> "The Rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings. And so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce. * * * The sufficiency of the evidence to sustain a trial court's conclusion or finding of an ultimate fact remains appropriate matter for the appellate court's consideration. * * * Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action. * * * An incorrect conclusion by a trial court qualifies as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52(a) specifically provides."

Decisions in other circuits to the same effect are:

Bach v. *Friden Calculating Machine Co.,* 155 F. (2d) 361 (CA 6, 1946).

J. S. Tyree, Chemist, Inc. v. *Thymo Borine Laboratory,* 151 F. (2d) 621 (CA 7, 1945).

Stubbs v. *Fulton National Bank of Atlanta,* 146 F. (2d) 558 (CA 5, 1945).

In the present case the evidentiary facts are not in conflict or dispute. This Court is not asked to weigh the probity of witnesses, or to choose between contradictory statements. Petitioner's evidence is uncontradicted, and respondent presented no evidence except the estate tax return. Much of this evidence is reflected and summarized in the Tax Court's findings of fact.

Some of the uncontradicted evidence considered material by petitioner was disregarded in the Tax Court's findings and opinion. But the principal error made by the Tax Court was in failing to give effect to many of its own findings of fact. It has drawn inferences and reached conclusions that are completely unsupported by the evidence. In some instances, inferences or conclusions stated in the opinion are directly inconsistent with its own findings of fact.

Recently, in *Wilshire & Western Sandwiches, Inc.* v. *Comm.*, 175 F. (2d) 718 (CA 9, 1949), reversing a Tax Court memorandum decision, this Court said (p. 721):

> "While it may be said that there are features looking both ways as to whether the advancements in this case were loans or stock purchases those sustaining a conclusion that the transaction was a loan greatly preponderate, chief of which as we have stated, is the intent of the parties at the time of entering into the transaction, * * *."

This Court is equally empowered in this case to review the evidence adduced at the hearing, to draw the proper inferences or conclusions therefrom, and to determine the ultimate fact that the transfers by decedent of his interest in the Hartford Building and Lake Beulah properties were not made in contemplation of death.

II.

The Transfers Were Occasioned By an Affirmative Living Motive Established By Clear and Uncontradicted Evidence.

Near the beginning of its opinion, the Tax Court said:

> "Though the crux of the matter is as to what the decedent contemplated, the record is almost, if not quite, barren as to what he actually had in mind." (R. 89)

We challenge that description of the record. We believe there is an abundance of evidence of the decedent's state of mind and his intentions. In addition, there is a clear-cut showing of his character and personality, his attitude and actions respecting his property, and like factors, so that the Court can readily and fairly determine how he would react to the situation with which he was faced, and whether, contrary to all other indications, there was any substantial likelihood that his actions in this instance were motivated by contemplation of death.

A.

DECEDENT'S MOTIVE WAS TO REMOVE AN IMPORTANT OBSTACLE TO HIS MARRIAGE.

In 1938 decedent had been a resident of Pasadena, California for about 20 years. He had been a widower since 1932. Several of his children and Mrs. Jenks, his sister and only other close relative, lived in the Chicago area. He continued to spend part of each summer with them at Lake Beulah in southern Wisconsin, but the rest of the time offered increasing prospects of loneliness.

His days were not occupied by the press of business affairs. He devoted all of his time to artistic and cultural pursuits and hobbies, to the affairs of fraternities, to meet-

ings and affairs of French societies and to travel. Attendance at the French club meetings brought him into frequent association with Harriette O'Neil, a French teacher of Pasadena. Their friendship ripened into affection, fortified by their mutual interests.

On May 8, 1938 decedent wrote a letter to each of his children, telling them of his desire to marry Miss O'Neil. (Ex. 20: R. 148-151) His description of her personal appearance and character might have been written by a college youth. It is apparent that entering into this marriage was the most important thing in his mind at that time. In his own words, "I feel, in my inmost heart, that I can not be truly happy again, alone."

However, Miss O'Neil was not yet ready to give her consent.

> "* * * she hesitates in our becoming engaged, from a very natural sensitiveness in coming into our long established family where there might be the slightest suggestion of being considered an interloper whose presence would not be entirely welcome to everyone.
>
> "Also, having lived as a bachelor girl, for so many years, she hesitates in giving up that freedom and independence which she has so long enjoyed, * * *. I fear that it may require a great amount of persuasion to induce her to change her mind, in spite of our mutual fondness.
>
> * * * * *
>
> "In view of the conditions, I should devoutly welcome any procedure which might tend to overcome her diffidence. * * *" (R. 148-149)

Decedent feared that even a mere coolness toward Miss O'Neil or the marriage would turn the scales against his suit. He was apparently not then aware that outright objection in one family quarter was in the offing.

Decedent's proposed remarriage met with the hearty approval of his children, who expressed their pleasure to him.

But his sister, Mrs. Jenks, and her husband were immediately opposed to the marriage, and voiced their objections frequently and vigorously. While these objections were made mainly in conversations with two of the children, Hyde and Marietta, the basis of the objection was known to decedent in or before June, 1938.

The objections by Mr. and Mrs. Jenks were provoked by financial matters between decedent and his sister. In June, 1931 decedent was indebted to Mrs. Jenks and gave her his personal promissory note for $34,000. The first two semi-annual interest payments were made on this note, but decedent made no payments thereafter. In December, 1936 a renewal note was given by decedent to Mrs. Jenks for $41,650 principal and accrued interest on the prior note. Decedent never made any payment of principal or interest on the 1936 note.

Mr. Jenks was quite different from decedent in character and disposition. He had once been treasurer of a business corporation. For years while he and decedent occupied an office together in Chicago he had busied himself with the management of the family property, while decedent was engaged in desultory architecture practice, designed covers for fraternity magazines and engaged in like non-business activities. Mr. Jenks had also engaged in important negotiations with the lessees of the Michigan Avenue property, and was proud of his success in obtaining $75,000 from them in connection with an option for the sale of that property. There had been some prior acrimonious correspondence on financial matters between the Jenkses and decedent. It is small wonder that decedent's announcement of his intention to marry Miss O'Neil evoked vigorous objection from Mr. and Mrs. Jenks.

These objections were stated on a number of occasions, first at the Jenks' apartment in Chicago and later at the Lake Beulah summer house. Mr. Jenks was particularly

vehement. He could not understand how decedent, who had been so long negligent of his debt to his sister, could think of taking on the expense of a new wife. He said that he would bring suit on the note to stop the marriage.

Hyde Gillette, decedent's oldest son, recognized that these objections from Mr. and Mrs. Jenks, would be likely to wreck his father's hopes. Miss O'Neil was reluctant to accept decedent's proposal because of a fear of mere coolness by other members of the family. It was likely that she would refuse to enter into a marriage that threatened to result in an outright family estrangement. Even if decedent could succeed in overcoming her objections, the rift between decedent and his sister would remain. Hyde decided that the only solution was to overcome the objections of Mr. and Mrs. Jenks, and he sought to do so. Numerous discussions with Mr. Jenks and with Howard Will, decedent's son-in-law and a practicing attorney at Chicago, resulted in a plan which met with the approval of Mr. and Mrs. Jenks, embracing the transfers here in controversy.

This plan was not made by decedent. Hyde first discussed it with him when he came to Chicago about August 1, 1938. The plan had then been completely formulated but no documents had been drawn pending decedent's approval. Although avoiding the more inflammatory statements of Mr. Jenks, Hyde told his father of Mr. Jenks' attitude toward getting some payment on the notes, pointing out that he had some grounds for feeling as he did. He then described the various arrangements that were proposed to meet these objections.

The evidence of decedent's reaction to the plan was as follows:

Testimony of Hyde Gillette.

> "My father's reaction to the plan was that if Howard and I thought it was all right and it met the problems that had arisen, for us to go ahead and draw up the

instruments. We did not discuss it with him much after the instruments were prepared. He left the matter entirely in our hands. I do not recall having any special or extended conferences going over the documents with him, except that I did try to make and felt duty bound to make it perfectly clear to him exactly what they meant and what they covered." (R. 159-160)

"* * * On those visits [week-ends at Lake Beulah in August and September, 1938] I do not recall any specific discussion that I had with my father on the subject of these transfers. We may have had casual conversations. I was not present on any occasion during which these transfers were discussed between Mr. and Mrs. Jenks and my father. It was my purpose in planning the transfers to keep the two families apart and as far as I know I did keep them from discussing the matter, at least in my presence." (R. 161)

"I explained the entire document in general to my father and gave it to him to read. I do not recall explaining the provision for distribution and termination to him specifically. I talked to him about these documents more in terms of the general principles involved, telling him that my one purpose was to permit him to continue a happy life in the way he wished and at the moment that involved making it possible for him to get married with the friendly feeling of all of the family." (R. 164)

Testimony of Howard A. Will.

"I first met Miss O'Neil on the day she signed the prenuptial agreement, September 19, 1938. That agreement had been prepared and given to Mr. Edwin Gillette two days prior thereto when he signed the trusts, and he was to take the agreement with him and discuss it with Miss O'Neil. She came in to Mr. Hyde Gillette's office on Monday, the 19th, along with Mr. Gillette.

"I had discussed the trust instruments with decedent in a general way prior to September 17th when he came to my office to sign them. On that day I went over the

instruments with him, highspotted the important provisions, and we discussed them rather thoroughly at that time." (R. 169-170)

"* * * I can't tell you exactly, but I think it must have been pointed out to Mr. Gillette that the corpus of the Michigan Avenue trust would eventually go to his four children. I don't recall that I explained to Mr. Gillette that if the Michigan Avenue trust was not revoked it provided for complete disposition of the property and he would have to do no more respecting the disposition of that property. I don't believe we got into such detail. Mr. Gillette was not a businessman. He wasn't a man whom you can discuss complicated business matters with very well.

"It was my impression that he had great love for his children. I can't recall that he ever definitely expressed an interest to make provision for their welfare. We had no extended conversation on that subject which would lead me to be able to tell you that that was my impression, he never said that he wanted his property divided after his death among his children. I had no such discussions as that with him." (R. 173)

Testimony of Harriette O'Neil Gillette.

"The subject [antenuptial agreement] was first mentioned to me by Mr. Gillette when he came to Kenilworth, Illinois to spend a week-end when he was visiting there. That was the 17th and 18th of September, 1938. I did not discuss the subject of an antenuptial agreement with him on that occasion. He told me that Hyde and Mr. Will were writing up some papers to that effect. We didn't discuss the agreement at all. * * * The papers which I signed and which, of course, I read and which were explained to me before I signed them mentioned that the Hartford Building and the Michigan Avenue property had been transferred to Hyde Gillette as trustee. I did not discuss any of these transfers with Mr. Gillette prior to the week-end he showed me the proposed antenuptial agreement. * * *

"* * * He never definitely discussed the debt due

> Mrs. Jenks. But just before I came East he seemed upset one day and when I asked him what it was he said his sister was annoyed at the idea of his marriage when he wrote the family that he was hoping to get married." (R. 131-132)

The decedent's state of mind was clear. His intended marriage, the objective uppermost in his mind, appeared well on its way to fulfillment. His children had satisfied Miss O'Neil that she would be welcomed into the family. He had been concerned over the objections of Mr. and Mrs. Jenks, but upon his arrival in Chicago about August 1, 1938, his son Hyde discussed their objections in a general way and told him that a solution had been found. The nature of the solution was discussed, but decedent was not a man to be concerned over such property matters. He had long been disinterested in such affairs, and there is nothing in his conduct in August and September, 1938 to indicate that his attitude was any different at that time. He gave only such attention to these affairs as he was forced to do by his son and son-in-law when they attempted to explain the plan and the instruments to him. Except for the discussion with his son about August 1 and the meetings on September 17 and 19, when the documents were signed, he engaged in only casual conversations on the whole subject.

The plan and the documents were presented to him as a whole, and he accepted them on that basis. He was not concerned with details. The plan was a means of removing an obstacle to his marriage. That was all that interested him. If his son and son-in-law "thought it was all right and it met the problems that had arisen" it was entirely satisfactory to him. The only problem confronting him was the threat to his marriage. It is submitted that the evidence clearly shows, without contradiction, that decedent's sole motive in making transfers of the Hartford Building and Lake Beulah properties was to remove an obstacle that

threatened his proposed remarriage, the most important thing in his mind at the time, and to preserve family harmony.

B.

A "LIVING" MOTIVE DISPROVES CONTEMPLATION OF DEATH AS A MATTER OF LAW.

In the leading case of *U. S.* v. *Wells,* 283 U. S. 102, 51 S. Ct. 446 (1931), the Court said (p. 118):

> "If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive."

Such a motive is attested by all the evidence in this case. The transfers were made, at a minimum, to preserve family harmony and, at a maximum, to remove a barrier to the accomplishment of the marriage itself. It is difficult to conceive of a motive more closely related to the continuance of life and dissociated from any thought of death. Corresponding motives in other cases have been regularly held to disprove contemplation of death.

In *Estate of Byram* v. *Comm.,* 9 TC 1 (1947), decedent, in order to obtain the consent of a Mrs. Evans to marriage, entered into an antenuptial agreement with her. He thereby promised to establish a trust for her benefit. The corpus of this trust was to reduce her rights in his property after his death. Respondent determined that this trust was created in contemplation of death, but the Tax Court held that this was disproved because the trust was a condition to obtaining Mrs. Evans' consent to marriage, even though it contained some provisions effective upon the grantor's death. Respondent has acquiesced in this decision, 1947-2 CB 1, indicating his complete approval of the principle that a transfer to induce marriage is not made in contemplation of death.

In *Lippincott* v. *Comm.*, 72 F. (2d) 788 (CA 3, 1934), the decedent, ten months before his death, conveyed to his daughter substantially all of his real estate, valued at over $1,000,000 and consisting mainly of residential property. At that time he had been contemplating a second marriage for at least a year and a half, but the woman in whom he was interested had twice refused to enter into an antenuptial agreement under which she would have accepted specified income payments in lieu of marital rights in his property. He did not want to have the real estate subject to the control and interference of his proposed second wife, and so he conveyed it to his daughter so he could enter into the marriage without the antenuptial agreement. The Board of Tax Appeals sustained a finding that this transfer was made in contemplation of death, relying upon the decedent's age and his poor health, and the fact that two physicians had advised him not to remarry. But the Court of Appeals reversed, saying that the Board seemed to have been so impressed by these factors that it overlooked the testimony showing that the decedent's dominant motive was to put him in a position to remarry without subjecting his real property to the control and interference of his second wife, which was a purpose associated with life and disproved contemplation of death.

See also *Terhune* v. *Welch*, 39 F. Supp. 430 (DC Mass., 1941), reversed on other grounds, 126 F. (2d) 695 (CA 1, 1942).

In taxing this decedent's transfers, the Tax Court erred both in fact and in law. Decedent was dominated by the thought of remarriage, and what he did was done to make that marriage possible. This is a motive completely unrelated to thoughts of death and disproves that the transfers were made in contemplation of death.

C.

THE PLAN WAS REASONABLY ADAPTED TO SATISFY THE REMARRIAGE MOTIVE, AND DOES NOT SUPPORT ANY OTHER MOTIVE ATTRIBUTABLE TO DECEDENT.

The Tax Court considered that it could disregard the foregoing evidence of decedent's motive because it thought that all parts of the plan were not necessary to his objective, or it could have been accomplished in some different way. The Tax Court seems to have attributed motives to the decedent which are inconsistent with the direct evidence and are wholly out of keeping with his character and conduct of financial affairs over a period of many years. At the hearing, the judge was satisfied that the decedent's character had been fully and accurately depicted (R. 136), and he has summarized the testimony to that effect in his findings (R. 78), but he has given no effect to these findings in his opinion.

Decedent had never been interested in matters of property. Between 1907 and 1920, he had attempted some business investments and had become seriously involved. Thereafter income checks were made payable to his first wife, who handled even the household finances. After her death in 1932, their daughter, Marietta, took over this task until she married and moved to Chicago in 1937. Decedent had long been satisfied to leave both the routine details and the major negotiations in connection with the family properties to his brother-in-law, Mr. Jenks, and later to his son, Hyde, after Hyde finished college and entered the investment banking business in Chicago in 1930. While the termination of the Hartford Building lease in 1933 reduced his income, rentals from the Michigan Avenue property remained adequate for his needs. Since 1931 he had been indebted to his sister, Mrs. Jenks, and had not

even paid interest thereon after the first year. This debt, originally for $34,000, had been increased to $41,650 by interest accruals when a renewal note was given in December, 1936, and the total principal and interest amounted to approximately $45,650 by September, 1938. Decedent had always lived for the moment. He had never displayed financial ability or foresight in handling his affairs. Yet the Tax Court envisions him as suddenly being engaged in a long-range plan for the distribution of his property when in fact his immediate problem in 1938 was the removal of an obstacle to his marriage.

Considering the program in detail, we do not believe it would seem unreasonable to a man of much more financial acumen and foresight than had ever been displayed by decedent. First, as to the Hartford Building, Hyde proposed that decedent convey this property into a trust, with the children as beneficiaries subject to payment of the debt to Mrs. Jenks. In return Hyde, as trustee, would assume payment of this debt. The Tax Court was concerned with disparity between the estimated value of decedent's interest in the Hartford Building and the amount of the debt. Since decedent was to be relieved of the debt, it was clearly in order that the property solely responsible for its payment be in excess of the face amount of the obligation. Decedent owned a half interest in land and a building, old and run down, which was situated partly upon land owned by other parties, and which had earned only a nominal amount in the preceding five years. The joint interests of decedent and his sister were subject to an $85,000 mortgage. Under those circumstances any estimate of the fair market value of decedent's undivided interest was necessarily theoretical and was a long way from cash in hand.

Decedent was not a man to be interested in frozen property values. The Hartford Building had produced virtually

no income since 1933. He was giving up nothing important to him. He was making possible the thing he most desired at that time, marriage to Miss O'Neil. By parting with this property and subjecting it to the payment of the note to Mrs. Jenks, he would dispose of this debt question once and for all. It had been a subject of intermittent disagreement in the past. At the moment it was an important potential barrier to his marriage. From his standpoint, he was gaining an important objective at a cost which must have been to him nominal or nonexistent.

As to the Lake Beulah property, the circumstances were both personal and financial. Although theoretically decedent was supposed to contribute half of the expenses connected with this property, he had been lax in doing so. This was an obvious source of irritation to Mr. and Mrs. Jenks, the sort of thing that would come to mind when their irritation was already sparked by other causes. There was also an undercurrent of feeling that the new wife might not fit congenially into the family circle at Lake Beulah. Miss O'Neil, already sensitive over intruding into the family circle, promptly sensed this situation, and was as much desirous as was Hyde Gillette of eliminating this possible source of further irritation.

The transfer of decedent's interest in this property to his children, some of whom lived in the Chicago area and were using it much more than he might expect to do, together with the coincident transfer of the expense burden to the children, was a logical and reasonable solution of this problem. This seems so apparent that it is impossible to understand why the Tax Court should disregard this evidence and seek to infer some other motive for this conveyance.

The Tax Court suggests that the decedent might have effected some other sort of settlement with Mrs. Jenks, for instance a mere mortgage on the Hartford Building

and the Lake Beulah property. Without attempting to labor the reasons for each of the details of the entire program, which are shown fully by the testimony (R. 152-154) and summarized to a large extent in the statements in this brief and in the Tax Court's own findings of fact (R. 82-83, 85-86), we submit that any such inquiry has no bearing upon the issue in this case.

First, we are concerned with what was done and why it was done, not what the judge of the Tax Court or any other person might have done in an attempt to solve a similar family problem. We are concerned only with the reasons for the transfers that were made. At most the inquiry should not go beyond the credibility of the reasons shown by the testimony. We believe any tests of credibility and reasonableness are fully satisfied.

As was said in *Wishard* v. *U. S.*, 143 F. (2d) 704, 708 (CA 7, 1944):

> "Nor are we impressed by defendant's argument that decedent could have achieved the desired result by a simpler method * * *."

Secondly, it is only the motive of the decedent with which we are concerned. The detailed program was formulated by Hyde Gillette, Howard Will, and the latter's associates in his law office. We believe what they had in mind is adequately explained by the testimony, but even if that were not the case there is no basis for attributing whatever they may have had in their minds to the decedent, particularly where such motives are wholly inconsistent with his character and conduct. We repeat that from decedent's standpoint there was only one problem, obstacles to his marriage to Miss O'Neil. The plan evolved at Chicago was presented to him as a means of solving that problem and he accepted it solely on that basis.

D.

THE ANTENUPTIAL AGREEMENT DOES NOT SUPPORT THE TAX COURT'S DECISION.

After substituting unsupported conjecture for clear-cut, direct and inferential evidence of decedent's motive, the Tax Court concludes its opinion by what seems a labored and unrealistic attempt to find contemplation of death in the language of an antenuptial agreement between decedent and Miss O'Neill.

The origin of this agreement and its purposes appear clearly in the evidence. It was suggested by a member of the law firm with which Howard Will was associated. The purpose was two-fold. First, it was thought to be desirable so that the various transfers would not be vulnerable to possible attack by Miss O'Neil after the marriage. The lawyers were merely protecting against a possibility of a claim by her that the transfers were in fraud of her marital rights. Secondly, it was desired to avoid any title complications should the lessees exercise their option to purchase the Michigan Avenue property. They had paid $75,000 for that option, and Mrs. Jenks and decedent were under bond to repay that amount if good title could not be given when the option was exercised. Howard Will and his law associates, taking a realistic view, saw the potentiality of an estrangement when the time came to convey the Michigan Avenue property, and did not want decedent's wife to be in a position to block that transaction. They protected against that possibility.

Under Illinois law, dower and homestead rights attach in inchoate form to real estate immediately upon marriage. The owner of real estate can not convey good title unless his spouse joins in the conveyance. It seems apparent that the provision for waiver of dower and homestead

rights in the antenuptial agreement has not the slightest inference of contemplation of death. With the lessees of the Michigan Avenue property obligated either to erect an office building thereon or deposit $100,000 in securities as a guaranty fund by March 1, 1939, the problem of title protection was imminent.

The Tax Court seizes upon the terms "wife, or widow" and other provisions of the agreement as indicating that decedent was contemplating death. These were the words and provisions of the attorneys, not of the decedent. The antenuptial agreement was delivered to decedent on Saturday, September 17, 1938, when he executed the trust agreements covering the Hartford Building and Michigan Avenue properties and the conveyance of the Lake Beulah property. He was to pass it on to Miss O'Neil so that she could examine it over the week-end. As shown by her testimony, previously quoted herein, decedent merely mentioned the agreement and showed it to her. She did not examine it in detail until the meeting on September 19, when she executed it. The antenuptial agreement was an incidental document, and so treated by everyone involved. The record does not support the Tax Court's exaltation of this instrument.

The Tax Court also seeks to find support for its decision in the fact that the children were not provided for in the decedent's will made on April 24, 1939. It is generally considered that the execution of a will contemporaneously with inter vivos transfers supports an inference that the decedent had some contemplation of death at the time of the transfers. The execution of a will over seven months after transfers were made and as a wholly independent transaction would seem to create an inference that the testator was not thinking of death at the time of the transfers.

The testimony is that decedent did not discuss the making of his will with the other members of his family in 1938 or thereafter. Even his wife did not know of it until after his death. Under these circumstances it seems particularly difficult to attribute any adverse significance to this decedent's will.

III.

Absence of Contemplation of Death Is Further Established By Decedent's Activities, Health and State of Mind.

"Contemplation of death" is not a statutory abstraction to be applied by the methods of metaphysics. It requires a consideration of the actual facts and circumstances that motivated a living person and influenced his actions. In noting that contemplation of death was not confined to imminent death, the Tax Court passed over a more basic requirement. As stated in *U.S.* v. *Wells,* 283 US 102, 117, 118 (1931):

> "Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition."
>
> "* * * The words 'in contemplation of death' means that the thought of death is the impelling cause of the transfer, * * *"

Again in *Allen* v. *Trust Co. of Georgia,* 326 US 630, 66 S. Ct. 389 the Court said (p. 635):

> "The transfer is made in contemplation of death if the thought of death is the 'impelling cause of the transfer.'"

In short, before there can be "contemplation of death", there must be a thought of death present in the decedent's mind, of such compelling force that it causes him to do things that he would not otherwise do. It follows that a determination by respondent that a transfer was made in

contemplation of death can be disproved by proof that such thoughts, if they existed at all, were not of serious concern to the decedent. Such proof may be found in the state of his health, his conduct, and his mental attitude.

It is established beyond question that this decedent, in 1938 and continuously up to a few days before his death, was in excellent health, and that he engaged in normal and vigorous activities. During the summers of 1938, 1939 and 1940, he went swimming almost daily during his visits to Lake Beulah. In 1939 and 1940 he built trails, sawed tree limbs and did other work around his cabin in Colorado, at an altitude of 9,000 feet. Within ten days before his death he stood and sang in a two-hour concert with his glee club. He never had an illness more serious than a common cold or other minor ailment, and visited physicians infrequently. Government counsel admitted that decedent was in good health (R. 148), and the Tax Court found that he was in good mental and physical condition. (R. 87-88, 94)

Decedent's conduct of his financial affairs gives further proof that he was not the sort of man to be strongly influenced by thoughts of death, particularly since, in view of his good health, such thoughts were bound to be remote. He had never previously shown any foresight in connection with his property. He had never been concerned with preserving or enhancing it. That he should have suddenly become interested in the devolution of property after his death, as the Tax Court seems to infer, is completely out of keeping with his character which, as described by several witnesses, had been consistent for a period of over 20 years.

There is something incongruous in thoughts of death being an important factor in the mind of a man who is about to be married and whose own words at the time were "Our spirits seem to be equally young in our ideals and

future outlook." It may well be possible for a man at such a time to be concerned with devolution of property and other remote and intricate business details, but it is impossible to conceive of this decedent as being such a man. Such planning would have been completely inconsistent with his character and modes of thoughts.

It was only by blinding itself to facts of this nature, which appear at some length in the findings of fact but are passed over with little or no mention in the opinion, that the Tax Court could say that the record in this case is "barren" as to the decedent's state of mind.

In *Wishard* v. *U. S.,* 143 F. (2d) 704 (CA 7, 1944), the Court said (p. 708):

> "Everything decedent did was consistent with the idea that he expected to live and be active for many years. His health, energy, vigor and activity militate against considering this transfer as one made in contemplation of death."

In *Estate of Johnson,* 10 TC 680 (1948), Acq. 1948 IRB 17, the Tax Court said (pp. 688-689):

> "The circumstances which tend to indicate that decedent's motives were associated with life are as follows: (a) Decedent's health at or before the time of the transfers was good; (b) decedent's nature and disposition were cheerful, sanguine, and optimistic; (c) there was an interval of four years between the time of the transfers and the time of decedent's death; (d) there was at the time of the transfers no testamentary scheme on the part of decedent, decedent's only will (so far as the record discloses) having been made four months after the transfers; * * *"

It is difficult to reconcile the Tax Court's opinion in that case with its opinion in the present case.

The Tax Court's apparent disregard of this evidence showing that decedent was not concerned with thoughts of

his death in 1938 and was not the sort of person who would have been moved to make property transfers by such thoughts, is a further ground for reversal.

IV.

The Tax Court Erroneously Relied Upon An Inapplicable Presumption.

In addition to substituting conjecture for evidence, the Tax Court appears to have relied heavily upon a presumption of correctness attending the respondent's determination. It seems to match this presumption against the evidence and to consider that the presumption has the greater weight. Thus, at the beginning of its opinion, the Tax Court said:

> "It is not necessary to cite cases to support the statement that the question is one of fact on all of the evidence, or that the petitioner, the Commissioner having determined that the transfers were made in contemplation of death, has the burden of proof to demonstrate the contrary.
>
> "Upon careful examination of the facts which we have found in detail, we have come to the conclusion that the petitioner has not met the burden imposed. * * * What little [evidence] does appear does not, in our opinion, by any means suffice to overcome the presumption of correctness of the Commissioner's determination." (R. 89-90)

And at the conclusion of its opinion, the Tax Court said:

> "* * * We conclude and hold that the petitioner has failed to show that the transfers of the Hartford and Lake Beulah properties were not, as determined by the Commissioner, in contemplation of death within the meaning of Section 811(c) of the Internal Revenue Code." (R. 95)

The presumption relied upon by the Tax Court is not evidence and is not to be weighed against evidence. It merely imposes an obligation upon the petitioner to put in some proof on the issue. When evidence is introduced the presumption vanishes.

These principles were stated, clearly and emphatically, by this Court in *Hemphill Schools, Inc.* v. *Comm.*, 137 F. (2d) 961 (CA 9, 1943). The Board of Tax Appeals, as in the present case, had said:

> "The evidence does not overcome the determination of respondent."

Reversing the Board, this Court said (pp. 963-964):

> "The Board's holding * * * appears to have been based upon respondent's determination that petitioner's gains and profits were permitted to accumulate beyond the reasonable needs of its business. Whether that determination was correct or incorrect was the principal, if not the sole, issue in the case. The burden of proving it incorrect rested on petitioner. Thus, if no evidence had been produced, the Board would have had to accept the determination; for, until evidence was produced, the determination was presumed to be correct.
>
> "Evidence *was* produced. Some of the evidence produced by petitioner tended to prove that its gains and profits were not permitted to accumulate beyond the reasonable needs of its business. *Evidence having been so produced, the presumption ceased, and thenceforth the issue depended 'wholly upon the evidence.' It thus became the duty of the Board to find from the evidence, and from it alone,* whether petitioner's gains and profits were permitted to accumulate beyond the reasonable needs of its business. No such finding was made. Instead, the Board treated the presumption (which no longer existed) as if it were evidence, weighed it against petitioner's evidence and concluded that petitioner's evidence did not 'overcome it.' [Emphasis supplied]

Other circuits are fully in accord. Thus, in *Hughes* v. *Comm.*, 153 F. (2d) 712 (CA 5, 1946), the Court said (pp. 713-715):

> "On petition for redetermination the Tax Court, acting by one judge, leaned heavily upon the presumption of correctness of the Commissioner's action, and reasoned away the uncontradicted testimony to the contrary by assuming that there might have been a sale or a gift by Mrs. Hughes to her husband * * *. The final conclusion that the burden of overturning the action of the Commissioner is not sustained we think is not according to law.
>
> * * * * *
>
> "Here the mere production of the stock certificate indicates Mrs. Hughes to be the owner, and if no more were shown it would prove the Commissioner was wrong.
>
> * * * * *
>
> "The presumption in its [Commissioner's determination] favor can not lawfully be given prevalence over the sworn testimony. * * *"

In the present case, the Tax Court has erred in failing to decide solely upon the evidence before it. It has attempted to "reason away" the uncontradicted testimony by unsupported assumptions and reliance upon a presumption which became non-existent shortly after the commencement of the hearing.

Sec. 811(c), previously quoted, provides that a transfer made within two years prior to death shall, unless shown to the contrary, be deemed to have been made in contemplation of death. This presumption is plainly inapplicable, since the Gillette transfers were made over five years before the date of death.

Under these circumstances a determination by the Commissioner that contemplation of death existed must have real factual support. The Commissioner's need of a pre-

sumption of correctness may be justified on grounds of administrative convenience, but there should be no suggestion by any court that this is a grant of untrammeled discretion to one of the adversaries in a tax controversy. The Tax Court might better have called upon respondent for evidence in support of his determination, or called attention to the lack of such evidence, than to have invested the bare determination with a robe of inviolability.

Conclusion.

The record in this case contains extensive and substantial evidence. The Tax Court made extensive findings of fact covering much of this evidence. But in the writing of its opinion, much of this evidence is brushed aside or even disregarded. Instead the Tax Court goes afield to support the respondent's determination, erroneously weighing an initial presumption of the correctness of this determination against the evidence, and erroneously substituting assumption and conjecture not supported by the evidence and in some instances directly inconsistent with the evidence.

The evidence itself—upon which the case should be decided—shows plainly and without contradiction that decedent was dominated by a motive wholly inconsistent with contemplation of death. His major concern in the summer and fall of 1938 was to marry Harriette O'Neil. There was an obstacle to this marriage. Decedent's son, with the assistance of his son-in-law, proposed a plan to overcome this obstacle. The program was suggested to decedent as a means of removing the obstacle to his marriage, and he accepted it on that basis. The transfers of his interest in the Hartford Building and Lake Beulah properties were important elements of that program. Having been made by decedent solely for the purpose of making

possible the desired marriage, they were not made in contemplation of death.

Additional evidence of the decedent's health, activities, mode of life, interests and hobbies and, on the other hand, his lack of interest in property matters, particularly a lack of foresight in that connection, gives no indication that thoughts of death were on his mind and any such thoughts would not be likely to influence his actions. Supplemented by the fact that he was about to enter into marriage, a time particularly dissociated from thoughts of death, there was abundant evidence that contemplation of death was not the "impelling cause" of his action in 1938.

It is submitted that the decision of the Tax Court should be reversed and that the transfers by decedent of the Hartford Building and Lake Beulah properties should be held not to have been made in contemplation of death.

Respectfully submitted,

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